10

10th *July* 1754.

Additional Information or Memorial

FOR

JOHN STUART-SHAW of *Greenock*, Purſuer;

AGAINST

The Lord CATHCART Defender.

IN *July* 1753, this Cauſe came in before your Lordſhips in the Inner Houſe, when it was argued by Council ſeveral Days; after which your Lordſhips having deſired Informations upon the Debate, before you ſhould proceed to give Judgment, for the more ſpeedy Diſpatch which both Parties profeſſed to deſire, you directed Informations to be prepared and lodged by *Michaelmas* laſt, that your Lordſhips might have it in your Power, during the remaining Weeks of the Harveſt Vacation, to peruſe and conſider them; and the Information for the Purſuer was accordingly prepared by the 22d *September*.

During laſt Winter Seſſion, it ſeems, that neither Party moved your Lordſhips to proceed to adviſe the Cauſe; but on the 14th *June*, the third Day of this Seſſion, your Lordſhips were moved, by both Parties jointly, to appoint a Day for adviſing it, and you accordingly appointed *Tueſday* the 2d current; but before that Day came, and no longer before it than *Wedneſday* the 26th *June*, an additional Information was diſtributed for the Defender, of only 31 *quarto* Pages, whereof the firſt 14 are employed, as it is there ſaid, in order to rectify the Miſtakes on the other Side, in Point of Fact, and the other 17 are employed in a ſuppletory Argument on the Point of Law treated in both the Informations, touching the Purſuer's Claim of Relief of the Intereſts of the Proviſion of 50,000 Merks made by the late Sir *John Shaw* for his Grandchild the Lady

 Cathcart,

Cathcart, during the Time that ſuch Intereſts were willfully incurred, or left unpaid by Sir *John Shaw*, whilſt he himſelf poſſeſſed the total Eſtate that was charged with the Proviſion.

And not contented with all this, the Managers for the Defender did, on the 29th *ultimo*, give in, or publiſh a third Paper, under the Name of an Appendix, conſiſting of 26 printed Pages.

And now the Managers for the Infant Purſuer, having peruſed theſe additional Pieces that have been produced by the Anxiety of the Defender's Doers, think it their Duty to take ſome Notice of them, and yet propoſe to do this very briefly, firſt of all taking Notice of the Matters of Fact that have been conteſted; and 2*dly*, but very briefly alſo, of the new Matter that hath been thrown out in theſe Papers by Way of Argument.

Objec. 1ſt. In the Additional Information, P. 3d, it is ſaid for the Defender, "That all the Lands of which the late Sir *John Shaw* was put in "Poſſeſſion by his Father, at his Marriage, did not exceed 3400 "Merks a Year, tho' the Father was obliged to make them up to "6000 Merks;" and this is alledged to contradict the Purſuer's Information, which ſays, "That Sir *John Shaw*'s Father allowed "his Son 8000 Merks *per annum* towards his Subſiſtence, out of "his the Father's total Liferent of the Eſtate, and this beſides diſ-"charging the Father's Faculties of burdening the ſame, *&c.*"

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Anſwer. The Allegation of the Purſuer was true, but needs ſome Explanation, which the Purſuer's Council had overlooked, the Truth being, that old Sir *John* obliged himſelf to allow his Son 6000 Merks of Aliment at leaſt; and further, to augment that Aliment to 8000 Merks, in the Event of the Son's Family being increaſed by a certain Number of Children, in the Contract ſpecified, which Event never happened; ſo that the Father's Conceſſion truly conſiſted of the abſolute Proviſion of 6000 Merks *per annum*, and the eventual or conditional Proviſion of 2000 Merks more; and whether the abſolute Proviſion of 6000 Merks was *de facto* made good to the Son, or if he was ſo meek or complaiſant to his Father, as to reſt ſatisfied with a Locality affording little more than the one Half of it, it is neither material in the preſent Queſtion, nor practicable for the now Purſuer, to enquire: Not material, becauſe the Father's Conceſſions in the Contract 1700 were binding upon him, whether afterwards the Son thought fit to exact the full Performance or not; and

and not practicable, becauſe the Purſuer has been unable to obtain any old Rental of the Eſtate of *Greenock*, whereby he might learn what was the true Amount of the Lands poſſeſſed by Sir *John* the Son his Grand-uncle, even as by the ſame Ignorance of, or Inability to prove an old Rental, the Purſuer was obliged to ſubmit to the Locality of which the Lady *Shaw* his Grand-aunt is poſſeſſed for her Jointure, tho' the preſent Rent of theſe Lands far exceeds the Jointure ſettled by her Contract. p 293

The Defender's additional Information, P. 7th, ſays, " It was a Objec. 2d.
" Miſtake in Point of Fact for the Purſuer to ſay, that of the
" Ground in or about the Town of *Greenock*, feued out by the
" late Sir *John Shaw* to his Daughter Lady *Cathcart*, *anno* 1718,
" there were 18 Acres upon which there was neither Houſe nor
" Yard at the Date of the Feu, the Fact being, that the whole 19
" Acres were at that Time either laid out in Houſes or Yards, in
" the preciſe Terms of the Entail.".

The Paſſages of the Purſuer's Information here referred to are Anſwer.
in the End of Page 9th and Beginning of Page 10th of that Information, and near the Middle of Page 24th, in the former of which Paſſages the Fact is ſtated, not from any Averment of the Purſuer or his Council, but from the Deed itſelf of Sir *John Shaw* in *Auguſt* 1719, there recited, which is very particular in expreſſing the Size of the old Feus of ſix Acres and Fractions, and of the new Feu of 19 Acres and Fractions; and concerning the latter, ſays, that of the ſaid Ground, being upwards of 19 Acres, a Part, being ſomewhat more than one Acre, had been already built upon at the Date of this Feu; and as Sir *John*'s Deed in 1719 is ſo particular in all the Meaſures, in Acres, Roods, Falls and Ells, if the Purſuers have been miſtaken, they were miſled by Sir *John*, who had the beſt Opportunity to know the Truth of the Caſe, and appears to have been ſtudiouſly accurate in ſetting it furth; and it is upon his Aſſertions that the Petitioner's Council proceed in their Argument; and in Point of Fact they muſt ſtill think that Sir *John Shaw*'s Aſſertion, in his Deed in *Auguſt* 1719, is better Evidence how the Fact then ſtood, which he is at Pains to ſet furth ſo minutely, than the Averment of the contrary made in Behalf of his Grandſon and Heir-general. And as for the Relevancy of the Purſuer's Objection, he cannot help thinking, that the feuing out of about 18 Acres p 294

of

of Ground at once, the beſt ſituated for the Increaſe of the Town, by Buildings, and doing this at 5 *s. per* Fall, the Rate preſcribed by the Tailie for Yards and Offices, the very Names of which ſuppoſe that there are ſome Dwelling-houſes, of which they are Pertinents, was by no Means acting in the preciſe Terms of the Entail, but, on the contrary, acting with Intent to evade and defeat the Scope and Intent thereof.

Objec. 3d. It is ſaid for the Defender, Additional Information, P. 9th, "That the Feus granted by old Sir *John Shaw*, both before and "after the Date of the Tailie, contain the very ſame Clauſes with "reſpect to the Converſion of the Caſualties, and diſcharging the "Irritancy *ob non ſolutum cannonem*, and the Privilege of the Quar- "ries for building, with what are contained in the Feu Right of "the Town of *Greenock*, by Sir *John Shaw* to his Daughter and "Grandchild."

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Anſwer. As for the Quarries here mentioned, for the Sake of which this Allegation is made, as an Anſwer to the Purſuer's Objection to that Article of Grievance in the Feu of the Town of *Greenock* to the Defender, it is anſwered, that the Practice of old Sir *John Shaw* appears, by his Feu Charters that are extant, of a quite different Plan and Spirit from that of the late Sir *John Shaw* now in queſtion; for inſtance, in reſpect of the Quarries, there is a Charter, of Date 30th *December* 1686, from old Sir *John Shaw* to *Allan Spier*, with Liberty of erecting farther Buildings upon the Ground in the Town of *Greenock* there granted, and ſuch Buildings being erected, to pay an additional Rent or Feu-duty in reſpect of the ſame; "And for "that Effect, (*i. e.* in order to enable the Vaſſal to carry on ſuch new Buildings) "the ſaid Sir *John* gives full Liberty to the "ſaid *Allan Spier*, to win, lead and away take Stones from the "Quarries that ſhall be appointed within the 40 Merk Land of "*Greenock* and *Finart*, they always paying Ground Mail therefor "to the ſaid Sir *John*, and his foreſaids, and the Damage to be ſu- "ſtained by the Tenants in leading thereof, as Uſe is."

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Here is one very material Difference in reſpect of the Quarries, beſides the Difference of the Payments to be made by the Vaſſal for Quarry Leave; namely, whether the Baron ſhall have the Power of aſſigning the Place in his Land, or if the Vaſſal himſelf ſhall have

have his Election, where he may furnish himself with Stones or open a Quarry.

In other respects, the late total Feu of the Town is widely different from the antient Feus, by which it has been already observed for the Pursuer, the Vassals of the Town have been astricted for their *invecta et illata*; and that the Defender, for his great Feu, is not so astricted; and yet in the subordinate Feus granted to his Sub-vassals, he takes them bound to pay Multures to him; and now the Pursuer has to add, *that* is done by a Clause in the following Terms; for Instance, in the Sub-feu granted by the Defender to *Patrick Colquhoun* Wright in *Greenock*, and *Daniel Taylor* Cooper there, where the Clause of Thirlage is in these Words: "And also bringing all Corns growing within the Barony of *Greenock*, "and consumed within the Grounds hereby feued, to the Mills "of *Wester Greenock*, and paying the accustomed Multures and "Services therefor." So far the Pursuer was obliged to the Defender for his being pleased to allow the Mills belonging to the taillied Estate the Benefit of the Thirlage of the *grana crescentia* upon that Estate itself; but as the Inhabitants of the Town might import Grain for their Consumpt from other Places, this *salvo* for the Thirlage of *grana crescentia* that should be consumed by that Vassal, might be of no Benefit at all to the Mill of the Barony; for the Charter of the Sub-feu proceeds in the Words following:

"And bringing all Malt or other Corns and Grain so consumed, "and not growing within the Barony, to any Hand-mill, or other "Engine sufficient for grinding their Malt or Corns, which I Lord "*Cathcart*, or my foresaids, shall appoint, providing the same shall "not be above one and a half Miles from *Greenock* Town; and paying to me therefore the like Multures, Services, and Sequels, as "the Tenants or Feuars in *Greenock* are bound to pay to the Mill "of *Greenock* for their Corns thirled thereto."

The Pursuer must submit to the Lords, if this does not discover a Scheme plainly calculated to intercept from the Baron or Lord of the Manour all Benefit arising from the Increase of his Burgh, and to ingross these Profits to this intermediate great Vassal, who was to be the immediate Superior of the Inhabitants or Occupiers of the Houses, and to reap the whole Advantages arising from the Pro-

ſperity or Increaſe of the Town, and ſpecially of the Conſumpt of Corn or Malt therein.

Again, as to the Harbour, the Defender's great Feu entitles him to the Uſe of that without paying Anchorage or Shore Dues; and this was alſo widely different from the Uſage of old Sir *John* in his Feus, and from the late Practice of the Defender in his Sub-feus: For Inſtance, in the Feu above mentioned, in *December* 1686, to *Allan Spier*, the Clauſe relating to this Article, is in theſe Words, "With Liberty alſo to the ſaid *Allan* and his foreſaids of the Harbour, for the yearly Payment, for all Ships, Barks and Boats they ſhall happen to have, of the accuſtomed Dues." And in the Sub-feu Charter above mentioned, from the now Defender to *Colquhoun* and *Taylor*, the Clauſe relating to the Harbour runs thus; "With Power alſo to them and their foreſaids, to have and enjoy the full Uſe, Benefit and Privilege of the Harbour of *Greenock*, for all Ships, Barks and Boats belonging to them, upon Payment of the ſame Duties and Caſualties to me Lord *Cathcart*, and my Heirs, which are and have been in uſe to be paid by others my Vaſſals in the Town of *Greenock*."

Is not this manifeſtly a Scheme or Syſtem for depriving the Baron of the Benefit of his Mills, of his Harbour, and of his Burgh itſelf, by veſting all theſe Advantages in the Perſon of one great Vaſſal in the Burgh, who, by theſe Deeds, is ſet up as his Rival or Partner in the tailied Eſtate?

Obj. 4th. In order to juſtify theſe Deeds, ſo far as concerns the Article of the Harbour, it is ſaid for the Defender, *Add. Inf. p.* 10. *in fine*, "That he ſhall now obſerve a further Circumſtance in Point of Fact, *viz.* that this Harbour was not begun to be built till the Year 1705, after the Death of Sir *John* the Father, and five Years after the Date of this Tailie, when the late Sir *John Shaw* begun this Work."

Anſ. 1ſt. The Harbour or Port of *Greenock*, being Part of the united Barony, was a Right or Privilege, making Part of the tailied Eſtate, which is diſtinct from and independent of the particular Structure of the Wharfs or Piers that may be there erected for the Conveniency of Shipping, or the better loading or unloading of Goods at ſuch Port or Harbour; which Sort of Buildings, no Doubt, may be varied or improved from Time to Time, according as

as the Opinion or Fancy of the Proprietor for the Time being may lead him: And therefore, ſuppoſing that the late Sir *John Shaw* had, at his own Expence, made ever ſo great Improvements or Meliorations on the Structure of the Harbour, and thereby of the tailied Eſtate, of which it is a Part, by encouraging the Increaſe of Trade or Shipping reſorting thither, this could not put it in his Power to alienate from the ſucceeding Heirs of Tailie the lawful Profits or Emoluments to which they are intitled, in their Order, as Proprietors of that Harbour.

Anſ. 2d. The Purſuer is well informed, that in Point of Fact, the Improvements of the Harbour here boaſted of, as being made by the late Sir *John Shaw*, were made at the Expence of the Town of *Greenock* itſelf, or by a voluntary Contribution of the Traders or Inhabitants there, who, for this and other Purpoſes, ſubmitted to a voluntary Collection or Tax of ſo much upon the Boll of Malt; and ſo the Matter continued until the Year 1751, when an Act of Parliament was very properly obtained, being the 24th Year of the King, Chap. 38. for levying a Duty of two Pennies *Scots* on every *Scotch* Pint of Ale and Beer tapt or ſold within the Town and Baronies of *Greenock* and *Finart*, for repairing the Harbour of the ſaid Town, and for other Purpoſes therein mentioned; which Act proceeds upon the Petition of the Managers of the ſaid Town of *Greenock*'s Funds, with the Approbation and Conſent of Sir *John Shaw* Proprietor of the ſaid Baronies, and Superior of the ſaid Town; and the Preamble of the Act recites, "That whereas the "Superior of the ſaid Town, with the Inhabitants thereof, did, "about the Year 1705, begin to raiſe Money by a voluntary Sub- "ſcription, for building a Harbour there, and ſome Progreſs has "from Time to Time been made in erecting of the ſame; but the "Produce of the ſaid Subſcription has been found inſufficient to "anſwer that Purpoſe, and to defray the Expence of cleanſing the "ſaid Harbour, and of performing other Works in relation there- "to, which are neceſſary to render the ſame uſeful and commodi- "ous; therefore, *&c.*"

It is farther ſaid for the Defender, *Add. Inf. p.* 11. in Defence of Obj. 5th. the Feu of the Lands of *Weſter Greenock*, "That the Feu-duty, pay- "able by the Defender to the Heir of Tailie, exceeds the preſent "Rent

" Rent of the Lands in no leſs than 26 *l. Sterling*, added to the " Rent, in conſideration of Houſes and Yards, which before " yielded no Rent; ſo that the Purſuer has no inconſiderable Bene- " fit by this Deed, which he now thinks fit to challenge."

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Anſwer. The Purſuer muſt be permitted to judge, by the Help of his Father and other Friends, who have only his Intereſt to conſult, what is moſt beneficial for him; and it muſt be obvious, that though 26 *l. Sterling* be no inconſiderable *Item* of a preſent Addition, even to a Rental of near one half of the Eſtate, or to ſuch Part of it as is already above 400 *l. Sterl.* of Rent; yet that Augmentation of about ſix *per cent* of the preſent Rental would be very dearly bought to the Proprietor and his Heirs, when it is acquired by way of a perpetual Feu-right, or Alienation of the Property; which, if it ſhould ſtand good or be ſuſtained, would forever preclude all future Improvements of the Eſtate or Augmentations of the Rental.

Obj. 6th. In the ſame Page it is further ſaid, for Support of this Feu, "That " Sir *John Shaw* the Father, after the Tailie, feued out a Part of " the Lands of *Braidſtane*," which is ſaid to be Evidence of his Senſe of the Faculty reſerved to him, and after his Death to his Son.

Anſwer. The Fact was, that Sir *John* the Father feued betwixt three and four Acres of very bad Land in this remote Part of the Eſtate, lying in the Shire of *Air*, which was granted to *Ker* of *Kerſland*, at a Feu-duty of 40 *s. Scots*, and neither the Father's Opinion, who was then only a Liferenter, nor the Son's Acquieſcence to ſuch an inconſiderable Feu, that was not worth challenging, either for its Situation or Value, can afford an Authority for enlarging his own Powers by way of Conſtruction of the Tailie 1700.

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Obj. 7th. As to the Land-tax or Ceſs, from the Payment whereof the Defender is freed by the Feu Rights granted to him and his deceaſed Mother, the Defender ſuggeſts, that the Lands feued cannot be ſubject to Ceſs, becauſe the ſame had no ſeparate valued Rent prior to the granting the Feu Rights.

Anſwer. That as the 19 or 20 Acres feued out to the Defender's Mother, as well as the other Parcels feued out to himſelf, were liable *in cumulo* with the reſt of the Lands to the Payment of the Ceſs, correſpondent to the valued Rent, ſo when the ſame were feued, they ought to have been burdened with ſuch a Share of the Land-tax to

which

which the whole Eſtate was liable, as did correſpond to the real Rent of theſe Lands, when compared with the real Rent of the whole Eſtate. Every Heretor, who feus out any Part of his Lands to a Vaſſal, takes ſuch Vaſſal bound to bear a Share of the Land-tax conform to a certain valued Rent, or leaves it to the Law to determine what Share of the Land-tax the Lands feued out ſhall bear the Burden of. Thus in all the Feus granted by the late Sir *John Shaw*, or his Father, prior to that to the Defender's Mother in 1719, the Vaſſals are expreſsly bound to relieve Sir *John Shaw* of all Ceſſes, Stents, Taxations, public Burdens, and Impoſitions which ſhall happen to be impoſed in Proportion to a certain Sum therein mentioned, condeſcended upon to continue as the valued Rent of the Lands feued out. And the noble Lord, the Defender, though he inſiſts in the Terms of the Feu-rights granted to his deceaſt Mother and himſelf, that the Lands feued out to her and him ought to be liable to no Part of the Ceſs, or other public Burdens impoſed on the whole Eſtate; yet, in the Sub-feus granted by him to the Vaſſals in the ſame Lands, he not only takes Care to aſcertain the valued Rent, by which the Lands ſo feued, ſhall bear a Share of the public Burdens, but alſo takes the Vaſſals expreſsly bound to relieve him of all Ceſſes, Stents, Taxes and public Burdens, to be impoſed upon the Lands ſub-feued conform to the Valuation thereby aſcertained; *and that by their making Payment thereof, as oft as the ſame ſhall be impoſed to his Lordſhip or his Collector, for whom he ſhould be anſwerable to the Vaſſals for their Exoneration thereanent.* p. 303

The Defender would make it a Doubt, whether, at the Time of the late Sir *John Shaw*'s Marriage, his Lady's Friends knew of the Charter 1686, whereby Sir *John* was put in the Fee of the Eſtate: But it is very certain, that Sir *John*'s Right by that Charter was well known to his Lady's Friends, becauſe in the Contract of Marriage between Sir *John* and his Lady, (which contains the Tailie now under Conſideration) there is the following Clauſe: " And alſo the " ſaid Sir *John Shaw* (the Father) does hereby renounce and *ſim-* " *pliciter* diſcharge the whole Powers and Faculties reſerved to him " by the former Rights of the ſaid Eſtate granted to his ſaid Son, to " affect and burden the ſaid Lands with the Sum of 50,000 Merks " for his Childrens Portions, and all other Powers and Faculties re- " ſerved to him by the ſaid former Rights." p. 304

So much concerning what is advanced in the first fourteen Pages of this additional Information, for rectifying, as it is said, Mistakes. On the other Side, in Point of Fact, the remaining seventeen Pages are employed in a long ingenious and subtile Argument on the Question of the Pursuer's Claim of Relief from the Defender, as Heir general of the late Sir *John Shaw*, for the Sum of 85,000 Merks, being the legal Interest of Lady *Cathcart*'s Provision of 50,000 Merks, during the Space of 34 Years, from *March* 1718, when she was married, to *April* 1752, when Sir *John Shaw* dyed; having been all the while in the full Possession of the Estate; and upon this Head, as being treated in the principal Information, the Pursuer will not minutely follow the Defender's additional Argument, but shall content himself with making a few Remarks.

And first of all, there is laid down for the Defender what he calls a Rule hitherto observed in the Construction of Entails, that no Implication is ever allowed; and this he says has been settled by repeated Judgments of this Court, and of the House of Lords; and for Proof of this Assertion quotes three Cases, whereof the first never went to the House of Lords, as far as the Pursuer has learned, being that decided in this Court 17th *June* 1746, Heirs of Tailie of *Agnes Campbel* against the Heirs of Provost *Wightman*; and the other two which went to the House of Lords were, *Hepburn* of *Kieth* against the Earl of *Hopetoun*, and Capt. *Sinclair* of *Carloury versus* Mr. *James Davidson* and others, decided in this Court 9th *November* 1749.

And as these three Cases are brought by the Defender's Council for proving their favourite Principle, the Pursuer must here observe upon them as follows:

The Tailie of *Roseburn* made by *Agnes Campbel* Relict of *Andrew Anderson*, to *Humphry Colquhoun* her Grandson by her eldest Daughter; which failing, to *William*, *Agnes*, and *Elisabeth Hamiltons* her Grandchildren by another Daughter, contained this single Restriction, "That it should not be lawful, nor in the Power of the "Heirs of Tailie, to alter, innovate, or infringe the foresaid Tailie, "or the Order of Succession therein appointed, or the Nature or "Quality thereof any Manner of Way." And the Fact happened, that by the Death of *Humphry Colquhoun* without Issue, the Succession opened to Mrs. *Anderson*'s other Grandchildren the Substitutes,

who

who ſold the Lands of *Roſeburn* to Provoſt *Wightman*, and after he had been for ſeveral Years in Poſſeſſion of his Purchaſe, a Reduction was brought at the Inſtance of the Children of the Sellers.

For the Defender it was pleaded, that there was no juſt Conſequence, nor fair or neceſſary Implication, from a Prohibition to alter the Order of Succeſſion, to a Reſtraint of the Uſe of the Property or Fee, by fair onerous Deeds, whether contracting of Debts, or total Sale of the Lands, for that theſe were quite diſtinct and and ſeparate Proviſions, whereof the one is not included in the other; and both *Dirleton* and *Stuart* lay it down expreſly, *voce Tailies*, Queſtion 4th "That a Perſon bound to do no Deed, to diſinherit "the ſucceeding Heirs of Tailie, and to keep the Tailie inviol- "able, may yet, for onerous Cauſes, diſpone or alienate the Eſtate, "tho' he cannot violate the Tailie by fraudulent and gratuitous "Deeds." And it was added, that a Father ſettling the Succeſſion in his Contract of Marriage to the Heir thereof, which is a frequent Caſe, daily occurring, is under as ſtrong a Prohibition of altering the Succeſſion, as he can be laid under by a Tailie; and yet all his onerous Deeds, whether charging his Eſtate with Debts, or ſelling it off, are good againſt the Heir of the Marriage. And ſuch being the Defence, the Lords, in reſpect the Tailie contained no Prohibition to alienate nor to contract Debts, repelled the Reaſons of Reduction, and aſſoilied the Heirs of Provoſt *Wightman*, who had been a fair Purchaſer for Value. p. 306

This Deciſion ſurely does not ſerve to prove the Defender's favourite Axiom. It found nothing but what is laid down in Books of Authority long ago, and is followed in the daily Practice of the Kingdom.

The other two Caſes of the Purchaſes of the Lands of *Kieth* and *Carlourie* were ſimilar to each other in all Reſpects, both as to the Merits and the Conduct of the Queſtion, as well before this Court as before the Houſe of Lords; the Truth being, that there was no ſerious Litigation in either of them, but the Parties apparently litigating, were all of one Side, deſirous to promote and bring about the ſame Concluſion of the Cauſe. p. 307.

In the laſt Caſe of *Carlourie*, ſo lately decided as the End of the Year 1749, Mr. *Hary Sinclair* was deſirous to ſell that Eſtate, and to lay out his Money towards buying back his paternal Eſtate of

Long-

Longformacus. Mr. *James Davidſon* the Bookſeller was the Purchaſer, who no ſooner ſigned a Minute of Sale, than he offered a Suſpenſion, alledging, that the Seller was diſabled by the Tailie to alienate. Mr. *Davidſon* could mean nothing by this, but to obtain the Sanction of your Lordſhips Decree for the Validity of his Bargain before he ſhould pay his Money; but he would have been very ſorry to have had his Reaſon of Suſpenſion ſuſtained, even as much as the Buyer, the ſuppoſed Charger; and ſo by a very amicable Concert, they found Means to obtain a Decreet, finding that the Charger had Power to ſell; and to make the Purchaſer perfectly ſafe, they carried on the Farce to the utmoſt, by an Appeal to the laſt Reſort, where, as the now Purſuer is moſt certainly informed, one Sollicitor was employed to manage the Cauſe both for Appellant and Reſpondent, who accordingly ſettled both the Caſes, and fee'd one Council of each Side to ſign them, taking Care no doubt, according to the Inſtructions given him, not to make the Caſe for the Appellants too ſtrong, or yet the Brief for their Council; and by this Manœuvre the Decree was affirmed.

The Purſuer has Reaſon to believe, that the other Caſe was altogether of the ſame Kind; an Action brought on Purpoſe to confirm the Title in a Purchaſe, tho' ſeemingly intended to reduce it. Theſe Lands of *Kieth* had been purchaſed for the late Earl of *Hopeton*, by his Tutors or Curators during his Pupillarity or Minority, and the Earl poſſeſſed them for many Years without Challenge, till at Length, a Reduction of the Sale was brought at the Inſtance of a ſubſtitute Heir, which in this Court, and in the laſt Reſort, had the ſame Reſult with the other; and both theſe Judgments doubtleſs had the Effect intended by the Procurers of them, namely, *jus facere* betwixt the Parties to thoſe Judgments, and to confirm the Titles of the reſpective Purchaſers, whatever might be the Motives or Conſiderations which induced the ſubſtitute Heirs of Tailie in thoſe Caſes, to make a Mock Fight, and to co-operate with their ſeeming Antagoniſts.

Now upon two ſuch Caſes as theſe, to ſet up a Maxim or Axiom of the Law, as an indefeaſible Principle ſettled by the higheſt Authority, which muſt govern all future Caſes, would be dreadful and pernicious to the reſt of Mankind.

Men may tranſact or compound, or gratuitouſly give up their own

Rights

Rights and Intereſts, but it would be unhappy indeed, if the Colluſion of one or two Parties in a private Cauſe, could make Law for the reſt of the Subjects, for determining Caſes that were not then in being, nor perhaps the Perſons coming afterwards to be concerned in them. The Authority of Deciſions, where there is a Series of *rerum ſimiliter judicatarum* is juſtly very great, but then it is of ſuch only as are truly *in foro contradictorio*, for otherways it is eaſy to miſlead a Court of Juſtice, however religiouſly diſpoſed to do Juſtice.

The Purſuer at preſent intends no more by offering theſe very ſerious Conſiderations, than to maintain, that theſe two Deciſions notwithſtanding, Tailies, as well as other Deeds by which Mens Rights are conſtituted, ought to receive a fair, candid and juſt Conſtruction, according to the true Intent and Meaning of the Deed, expreſſed by apt Words to declare or import that Meaning; and that in the Conſtruction of theſe, as well as other Deeds and Laws, it is not juſt *verba captare*, or, by a judicial Adherence to the Letter, to defeat or overthrow the manifeſt Intent of the Maker, which was within his Power, and which he has ſufficiently expreſſed or declared by his Deeds.

It is unneceſſary and might be improper for the Purſuer to enter into the Merits of the two Caſes abovementioned, quoted for the Defender, that are now finally decided; it is ſufficient for the Purſuer's preſent Argument to have ſhown Cauſe, why they ought not to be drawn into Precedent, or ſerve to eſtabliſh a ſtanding Rule towards the Deciſion of other Mens Caſes, namely, that they were not ſeriouſly or in good Earneſt repreſented and debated.

It is ſaid for the Defender, *p.* 23. "That in the Caſe of *Durris*, there was the Authority of an Act of Parliament given for the Sale of an entailed Eſtate, for Payment of the Arrears of Intereſt allowed to be run on, during the Poſſeſſion of the Heir in Life, namely, Sir *Peter Fraſer* of *Durris*, who was ſucceeded by his Nephew the Lord *Mordaunt* as Heir of Tailie."

The Purſuer never conteſted, that the Arrears of Intereſt on a Anſwer.
Debt authoriſed by the Tailie would be an effectual Burden on the tailied Eſtate, till it ſhould be cleared or paid off; and if Sir *Peter Fraſer* had left an Heir in general, or Executor taking Effects from him ſufficient to give Relief to the Lord *Mordaunt* the Heir of Tailie, and that the latter had been denied that Relief, then might that

Caſe have been quoted as a Precedent for the Defender; but as there was truly no Fund of Relief, there was no Place for asking or granting it. There was a Neceſſity for getting Power to ſell Part of the tailied Eſtate to ſave the reſt.

The Purſuer, upon this important Branch of his Cauſe, has now the good Fortune to be able to lay before your Lordſhips, a Deciſion of the laſt Reſort, which has occurred ſince the Debate in this Cauſe, and even ſince the firſt Informations were written, which, he apprehends, affords a ſtrong Authority for his Side of the Argument; tho' there was no Occaſion to give an explicit Deciſion upon that very Point, but, according to his beſt Information, it was one chief Motive of the Judgment given, which, with the Caſe itſelf, was as follows:

Sir *Kenneth Mackenzie* Bart. was the Appellant, and *John Stuart* Eſq; and others Reſpondents: The Appellant was a ſubſtitute Heir of Tailie in the Eſtate of *Royſton*, failing Sir *James Mackenzie* and the Heirs-male of his Body, and as ſuch brought his Action in this Court, as being intitled to the Reſidue of the Purchaſe Money of *Royſton*, againſt *John Stuart* as repreſenting Sir *James* his Mother's Father, for an Application of the Reſidue of that Purchaſe Money, after Payment of the juſt, true and lawful Debts really affecting the Entail, and, in order thereto, for an Account of what Payments had been made, and upon what Incumbrances, with the Vouchers thereof.

The Purſuer ſet forth in his Libel, and in his Caſe, the Facts by which he had been aggrieved, by Fraud and Impoſition, as he alledged, upon the Legiſlature itſelf, and upon Sir *George Mackenzie* his elder Brother, when, in the Year 1739, Sir *James*, with Concurrence of his only Son *George*, and of his Nephew Sir *George Mackenzie* the eldeſt Son of Sir *Kenneth*, and the elder Brother of Sir *Kenneth* younger the Appellant, petitioned the Parliament for Leave to bring in a Bill to ſell the Eſtate of *Royſton*, for Payment of Debts to which it was ſubject, which Bill, upon his Allegations, accordingly was brought in, and paſt into an Act, upon a Recital of the Allegations in the Petition, as if they had been true, and authoriſed the Sale of the Eſtate, and enacted, that the Moneys ariſing by ſuch Sale ſhould be veſted in Truſtees, and by them applied, firſt to pay off the Expences of the Act, and in the next Place to

pay

pay off and discharge two principal Debts therein mentioned, with which the said Estate and Premisses stood then charged and incumbred, with the Arrears of Interest; and, 3dly, to lay out the Residue and Surplus of the Money arising by such Sale, for the Uses of the Tailie of *Royston*, made in the Year 1688, in the same Order and Course of Succession, and subject to the Restrictions and Limitations in the original Tailie contained. p 312

In pursuance of this Act of Parliament, the Lands and Barony of *Royston* were sold to the late Duke of *Argyle* for 7000 *l. Sterling*; which Sale or Purchase Sir *George* the Appellant could not, nor did attempt to impugn, but insisted for a fair Account of the Application of the Price, alledging these Wrongs or Grievances to have been committed to his Prejudice:

First, that the two original or principal Sums alledged to be standing out on the tailied Estate, were not true Debts really affecting the same, but were false and fictitious Claims; the first being the Sum of 20,000 Merks, as a Provision for the Lady *Anne Mackenzie*, the youngest Daughter of *George* Earl of *Cromarty*, the Maker of the Entail of *Royston*, to himself and his Lady for Life, and in Fee to Sir *James* his third Son, and the Heirs-male of his Body, which failing, to Sir *Kenneth* his second Son, and the Heirs-male of his Body, with the Burden of 20,000 Merks to Lady *Anne*, payable within Year and Day after the Death of the Earl and his Lady, and Survivor of them, with Interest during the Not-payment; which Bond, he alledged, was cancelled, and a new Security given to Lady *Anne* on another Part of her Father's Estate; which new Security was afterwards paid by her Father, and given up by her; and that after this, in *April* 1707, a new Bond was executed by the Earl to his Daughter Lady *Anne*, for 2000 Merks, but antedated as of the same Date with the Entail in *November* 1688, and made payable as at *Whitsunday* 1689, with Interest from that Term; that this Bond Lady *Anne* was made to assign to her Uncle Lord *Prestonhall*, who of the same Date granted a Back-bond to Sir *James Mackenzie*, obliging himself to assign the said Bond of Provision to Sir *James*, to the Effect that he might use Diligence thereupon, for recovering the principal Sum, Interest and Penalty, out of the said Estate of *Royston*, but so as not to be a Ground of p 313

any

any Diligence to affect the Earl of *Cromarty* or his Heirs or Succeſſors, their Perſons or Eſtates, except the Lands of *Royſton*.

That the other principal Debt conſiſted of an heretable Debt upon the Eſtate of *Royſton*, to one *Humphry Lundin*, for 8250 Merks *Scots*, granted by *George* Earl of *Cromarty* on the 16th *November* 1706, which was 18 Years after Earl *George* had reduced himſelf to be no more than Liferenter of the Eſtate of *Royſton*.

The ſecond Iniquity or Grievance complained of by the Appellant, was, that theſe two principal Debts, ſuppoſing they had been genuine and true, amounted to no more than 28250 Merks *Scots*, or 1569 *l.* 9 *s.* 0 *d.* 2-3ds *Sterling*, which being deducted from the Price of the Eſtate 7000 *l.* there remained 5430 *l.* 10 *s.* 11 *d.* 1-3d.

That in order to exhauſt this Sum a ſecond fictitious Claim was made and ſet forth, as if there had been an Arrear of Intereſt upon theſe two Debts incurred during the Time that Sir *James Mackenzie* himſelf was in Poſſeſſion of the Eſtate, of no leſs than 4308 *l.* 6 *s.* 8 *d. Sterling*, for Payment of which, as well as the Principal, he procured the Act of Parliament for Sale of the tailied Eſtate, being far more than double of the principal Sums of the pretended Debts, which were ſtated as if they were ſtanding out in the Hands of third Parties, Sir *James* concealing the Intereſt that he himſelf had in them, or that they were held in Truſt for him.

Againſt this ſecond and greateſt Article ſet forth for exhauſting the Eſtate, namely, the Arrears of Intereſt on the ſuppoſed original Debts, the Appellant offered his Reaſons of Appeal in the Words following:

" Admitting (*i. e.* ſuppoſing) the Debts as real Incumbrances " on the Eſtate, nothing is clearer than that Sir *James* was bound " to keep down the growing Intereſts in his Time. The Act makes " no Variation in this Particular; it only recites the Amount of the " two Debts to ſo much, *beſides the Arrears of Intereſt, for Payment* " *of which the Inheritance might be carried off*; which is certainly " true as to the Creditors, but no way influences the Proportion of " Intereſt payable by the Rules of Law and Equity, as amongſt " the Heirs themſelves; the Appellent therefore has Right to an " Account, and to Satisfaction out of Sir *James*'s Aſſets for ſo much " of the Intereſts as accrued during his Perception of Profits, and " with which he has wrongfully charged the Eſtate, the Amount

" whereof

" whereof is Part of the Surplus directed by the Act to be settled " to the old Uses."

In this Cause the Lord Ordinary had, by Interlocutor of the 20th *January* 1747, " Found, that Sir *George* was not barred by the " Agreement from objecting to the Debts, or from proving the same " to be fictitious, and not real Debts affecting the Estate of *Roy-* " *ston* at the Time of the Sale, and granted Warrant for Letters of " incident Diligence, at Sir *George*'s Instance, for recovering the " Grounds and Instructions of the said Debts."

After this, Sir *George* died, and the Appellant being his next Brother and Heir of Entail, the Cause was revived in his Name; and then,

On the 1st *July* 1752, the Lords, on Report of the Lord Ordinary, " Found, that those Debts that by the Act of Parliament are " appointed to be paid out of the Price of the Estate of *Royston*, " must be stated to exhaust the said Price; and that the Price of the " Estate being exhausted by these Debts, there is no Ground for a " further Count and Reckoning; and therefore assoilie and decern."

The Judgment, upon hearing the Appeal on the 14th *March* 1754, was, That this last Interlocutor of the 1st *July* 1752, appealed from, be reversed, and that the Interlocutor of the Lord Ordinary of the 20th *January* 1747 be affirmed.

Now here let it be observed, that the Debts appointed to be paid out of the Price of the Estate of *Royston*, by the Act of Parliament, consisted chiefly, or for the far greatest Part, of the Arrears of Interest alledged to have been incurred and standing out upon the two principal Debts set forth in the Petition for the Act, which, supposing them genuine or true Debts, amounted to no more than 28250 Merks, or 1569 *l.* 9 *s.* 0 *d.* 2-3ds *Sterling*, which was little more than one-third of the pretended Arrears of Interest set forth as a Reason for the Necessity of a Sale of the Estate, for which the principal Sums alone could not have afforded a sufficient Reason, being less than the fourth Part of the Value of the Estate. And besides, tho' the House of Lords could judge of what we call the Relevancy of the first Complaint or Wrong alledged by the Appellant, namely, that the two principal Debts were fictitious, there was no Evidence before their Lordships to judge with any Certainty how that Matter stood: But supposing the principal Debts to have been

true and genuine, the ſecond great Article of Complaint, namely, the procuring a Warrant to ſell the Eſtate, for Payment of a much greater Sum than double the Principals, under the Name of Arrears of Intereſt incurred, whilſt Sir *James Mackenzie* himſelf was in the full Poſſeſſion of the Eſtate, or in the Perception of the Rents and Profits thereof, was a Matter of Law or Equity, of which they could at once ſee the Juſtice and Force; and according to good Information the Purſuer has received, which is confirmed by real Evidence from the State of the Caſe itſelf, it was the Poſitions in the Reaſons of Appeal above recited, which were held to be manifeſtly juſt and true, that principally moved their Lordſhips to the Decree of Reverſal aforeſaid.

It remains only for the Purſuer to take ſome Notice of the laſt Piece offered for the Defender, intituled, Appendix, which conſiſts in a Liſt of Inſtances from the Regiſter of Tailies, conſiſting of 25 or 26 Pages; but the Purſuer and his Council find themſelves under ſome Difficulty to comprehend for what Purpoſe theſe are offered to your Lordſhips, as very little, if any thing, is ſaid on the Part of the Defender, why or to what Purpoſe theſe are offered.

The firſt Claſs however is intituled, Inſtances of Tailies which contain Clauſes obliging the ſeveral Heirs to pay the Principal or Annualrents of Debts affecting the Eſtate, *&c.* and the Purpoſe of this firſt and main Claſs, (containing 32 Inſtances) is briefly explained in the Preamble, to be for ſhowing that no ſuch implied Obligation, as the Purſuer alledges, (*viz.* on the Heir of Tailie to keep down the Intereſt during his Poſſeſſion) has been hitherto underſtood, and that for this Purpoſe, the Defender has ſubjoined a Liſt of theſe Inſtances in the Record of Tailies, from which it is ſaid to appear, that where it was intended to ſecure the Eſtate from being carried off by growing Annualrents, or annual Burdens, that it is uſual to add proper Clauſes for that Purpoſe.

Anſwer. The Defender might have brought a Hundred Inſtances for every One of theſe in his Liſt, wherein Men in their Teſtaments have appointed their Executors, to pay, in the firſt Place, their funeral Charges and lawful Debts; or in the Settlement of their real Eſtates upon their eldeſt Sons, or next Heirs, declared, that by their Acceptation thereof, they ſhould be bound to pay all the lawful Debts of the Diſponer; all which the Compiler of theſe Inſtances might have

have as wiſely brought, in order to have proved to your Lordſhips, by ſuch frequent Uſage, that it had not been hitherto underſtood, that an Executor as ſuch was not bound, without ſpecial Appointment, to pay the Funeral Charges or lawful Debts of the Teſtator, or that the Heir taking the real Eſtate, whether by Succeſſion or Diſpoſition, was not bound to pay his Predeceſſor's Debts without being ſpecially appointed ſo to do.

As for the other Claſſes of Inſtances, as the Purſuer does not comprehend what the Uſe of them can be in the preſent Queſtion, nor does perceive they tend to prove any thing that it concerns him to conteſt or deny, he will not preſume to trouble your Lordſhips with any particular Remarks upon them, and far leſs tire you with a Counter-condeſcendence of Inſtances, which might be brought, if he thought it material, to delay the Deciſion of his Cauſe, till ſuch moſt unneceſſary Search ſhould be made into the Regiſter of Tailies, which conſiſts, as by a Certificate herewith produced, of no leſs than 9564 Folio Pages, which comprehend 419 different Tailies, whereof all the four Claſſes in the Appendix offered for the Defender, contain Excerpts only from 66, amongſt which the Tailies on Record, made by ſome of the greateſt Names that ever were of the Law of *Scotland*, ſuch as Sir *John Nisbet* of *Dirleton*, and the late Lord Preſident *Dundas*, and divers others, who were Judges in this Court, afford none of the Inſtances picked out for the Defender, to furniſh an Argument for him, ſuch as it is in the preſent Queſtion. fo 319

In reſpect whereof, &c.

WILL. GRANT.